

**BEFORE THE MONTGOMERY COUNTY  
BOARD OF APPEALS**  
**Office of Zoning and Administrative Hearings**  
**Stella B. Werner Council Office Building**  
**Rockville, Maryland 20850**  
**(240) 777-6660**

**IN THE MATTER OF:  
BAYWOOD HOTELS, INC.**  
Petitioner

Al Patel  
Richard Fenstermaker  
Paul Newman  
Victoria Bryant  
David Nelson  
For the Petition

Patricia Harris, Esquire  
Attorney for the Petitioner

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Martin Klauber, Esquire, People's Counsel \*  
In Support of the Petition \*

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Board of Appeals Case No. S-2656  
(OZAH Case No. 06-10)

Before: Martin L. Grossman, Hearing Examiner

## HEARING EXAMINER'S REPORT AND RECOMMENDATION

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## **I. STATEMENT OF THE CASE**

Petition No. S-2656, filed on July 27, 2005, seeks a special exception, pursuant to §59-G-2.33 of the Zoning Ordinance, to permit establishment of a hotel (a Hilton Garden Inn) at 2200 Broadbirch Drive, Silver Spring, on land zoned I-1 (Light Industrial) and within the U.S. 29/Cherry Hill Road Employment Area Overlay Zone of the Fairland Master Plan (hereinafter, “Cherry Hill Employment Overlay Zone” or merely, “Overlay Zone”). The Tax Account Number is 05-03484837.

On September 6, 2005, the Board of Appeals issued a notice (Exhibit 12) that a hearing in this matter would be held by the Hearing Examiner for Montgomery County on December 2, 2005, at 9:30 a.m., in the Stella B. Werner Council Office Building. That notice was subsequently corrected to schedule the hearing for December 16, 2005 (Exhibit 14); however, on November 21, 2005, Petitioner’s attorney filed a letter seeking to postpone the hearing until January 30, 2006, to allow Petitioner additional time to address concerns raised by Technical Staff of the Maryland-National Capital Parks and Planning Commission (M-NCPPC).

By notice dated December 1, 2005 (Exhibit 16), the hearing was continued until January 30, 2006, as requested by Petitioner. Prior to the hearing, Petitioner moved to amend the petition three times, and notices were issued therefor on January 5, 11 and 20, 2006 (Exhibits 18, 20 and 27, respectively). These motions were unopposed and therefore granted, under the terms of the notices.

Technical Staff, in a memorandum dated January 13, 2006, recommended approval of the petition, with conditions (Exhibit 30).<sup>1</sup> On January 19, 2006, the Planning Board voted unanimously to approve the petition, recommending the same conditions as Technical Staff (Exhibit 32, dated January 24, 2006).

The only community response to the requested special exception has been in support of the petition. On January 18, 2006, Raymond Mocarski, owner of the adjacent Restaurant Park, wrote to

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<sup>1</sup> The Technical Staff Report is frequently quoted and paraphrased herein.

assure that he would modify his site plan to ensure the alignment of the driveway connection between the Baywood Hotel site and the Restaurant Park site. Exhibit 26. On January 26, 2006, Don Praisner, Vice-President of the Calvert Citizens Association, wrote to express the community's support of the application. Exhibit 33.

A public hearing was convened as scheduled on January 30, 2006, and the only witnesses were called by Petitioner. The record was held open until February 16, 2006, to allow Petitioner time to file some revised plans and to give Technical Staff time to review them. As it turned out, Petitioner was unable to file its revised plans until February 24, 2006, so the record had to be reopened to receive them. After some minor corrections to the revised site and lighting plans suggested by Technical Staff (Exhibit 48), Technical Staff e-mailed approvals (Exhibits 51 and 52) of the final revised plans (Exhibits 49 and 50), and the record was reopened and closed again on March 20, 2006, to receive them and Staff's comments. There is no opposition in this case, and all the evidence supports granting the petition.

The only issue which makes this case a little out of the ordinary is that it must have a site plan review by the Planning Board in addition to the special exception review by the Board of Appeals. Such review is required by Zoning Ordinance §§59-C-5.31(b) and 5.41(b)(4) because the proposed hotel, at a maximum of 55 feet and four stories, will be over three stories and more than 42 feet tall. The Hearing Examiner has proposed a condition which requires Petitioner to file the Site Plan approved by the Planning Board with the Board of Appeals and request an administrative modification of the Special Exception Site Plan to coincide with any material changes approved by the Planning Board at Site Plan Review. Petitioner has agreed to this condition. Tr. 100-101.

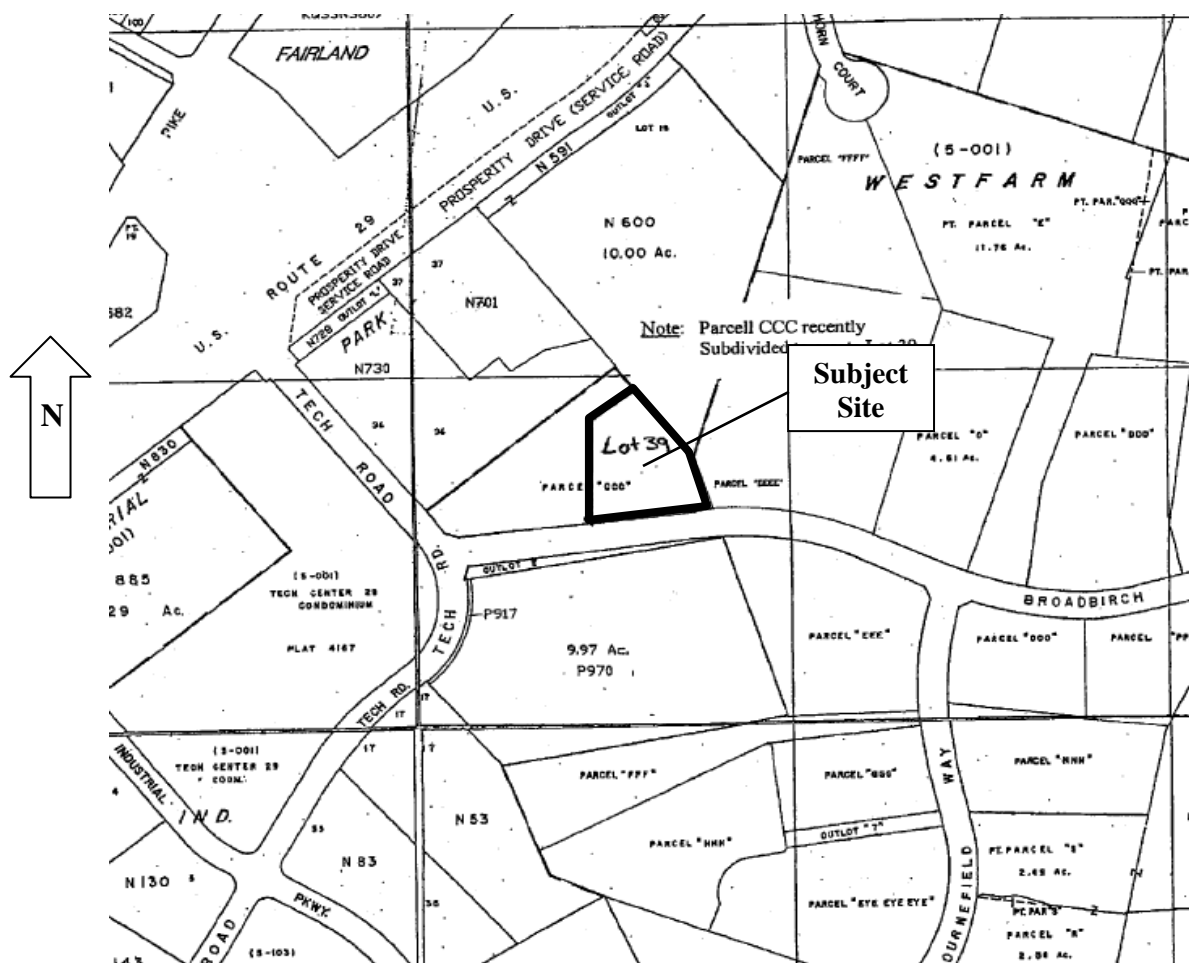
## **II. FACTUAL BACKGROUND**

### **A. The Subject Property**

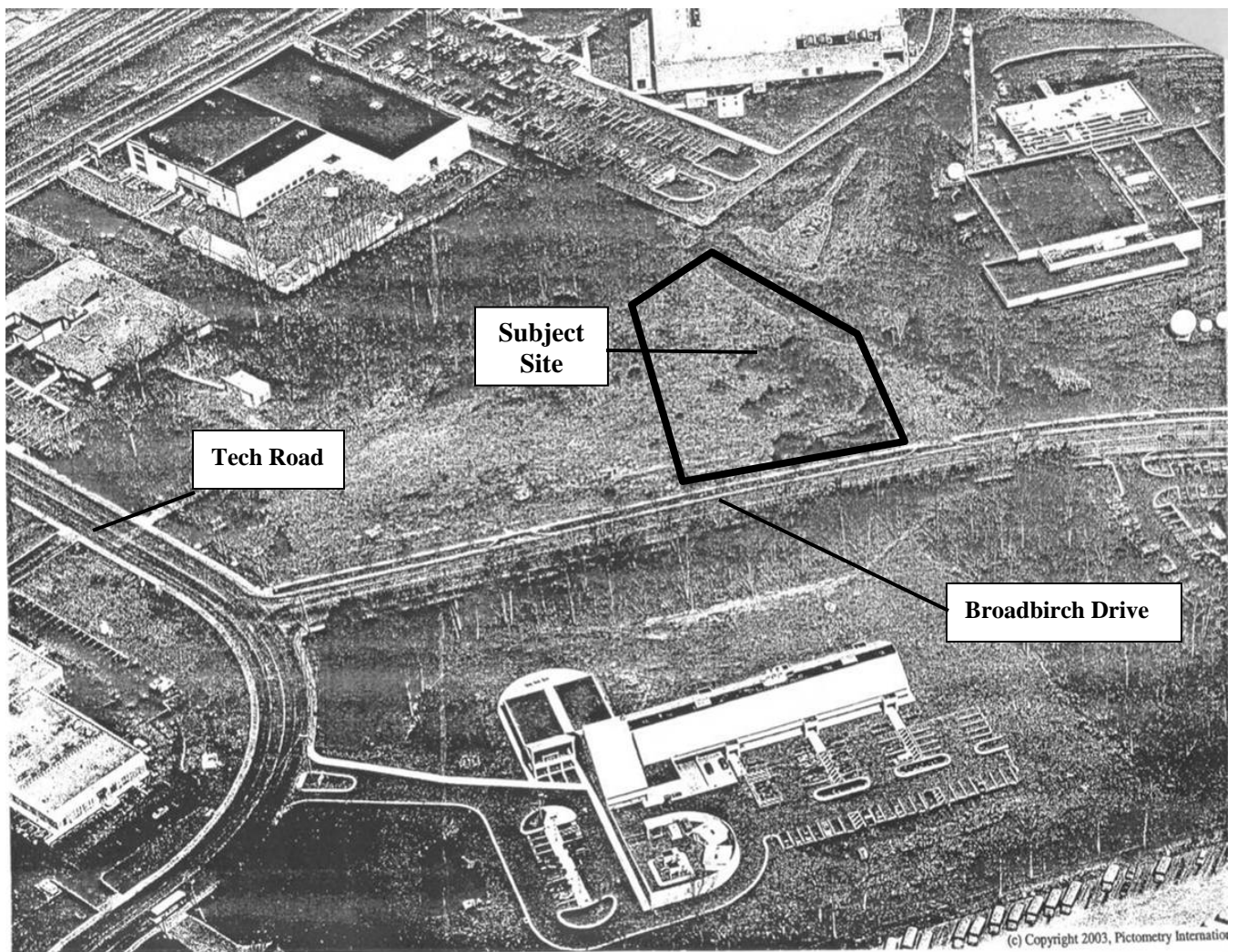
As noted above, the subject property is located at 2200 Broadbirch Drive, Silver Spring, within both the I-1 Zone and the Cherry Hill Employment Overlay Zone. Its legal description is Lot 39,

Montgomery Industrial Park, and it is part of the 200 acre WesTech Business Park (formerly West-Farm Technology Park). The subject property is already a recorded lot and will not need to go through subdivision. The subdivision plat for Lot 39 was recorded on June 3, 2005 in Plat No. 23171, MNCPPC No. 625-46. The lot was formerly part of Parcel "CCC" of the Westfarm Technology Park. All of the land surrounding the Property is zoned I-1.

The site is on the north side of Broadbirch Drive, approximately 450 feet to the west of the intersection of Broadbirch Drive and Tech Road, and just to the southeast of Columbia Pike (Route 29). Another nearby intersection is Columbia Pike and Cherry Hill Road, to the northeast of the site. Broadbirch Drive is a two-way street with two lanes of traffic in either direction, and there are four-foot wide sidewalks and approximately 8-foot wide tree panels, with street trees on both sides of the road. The immediate area is shown below in Petitioner's tax map (Exhibit 11(b)):

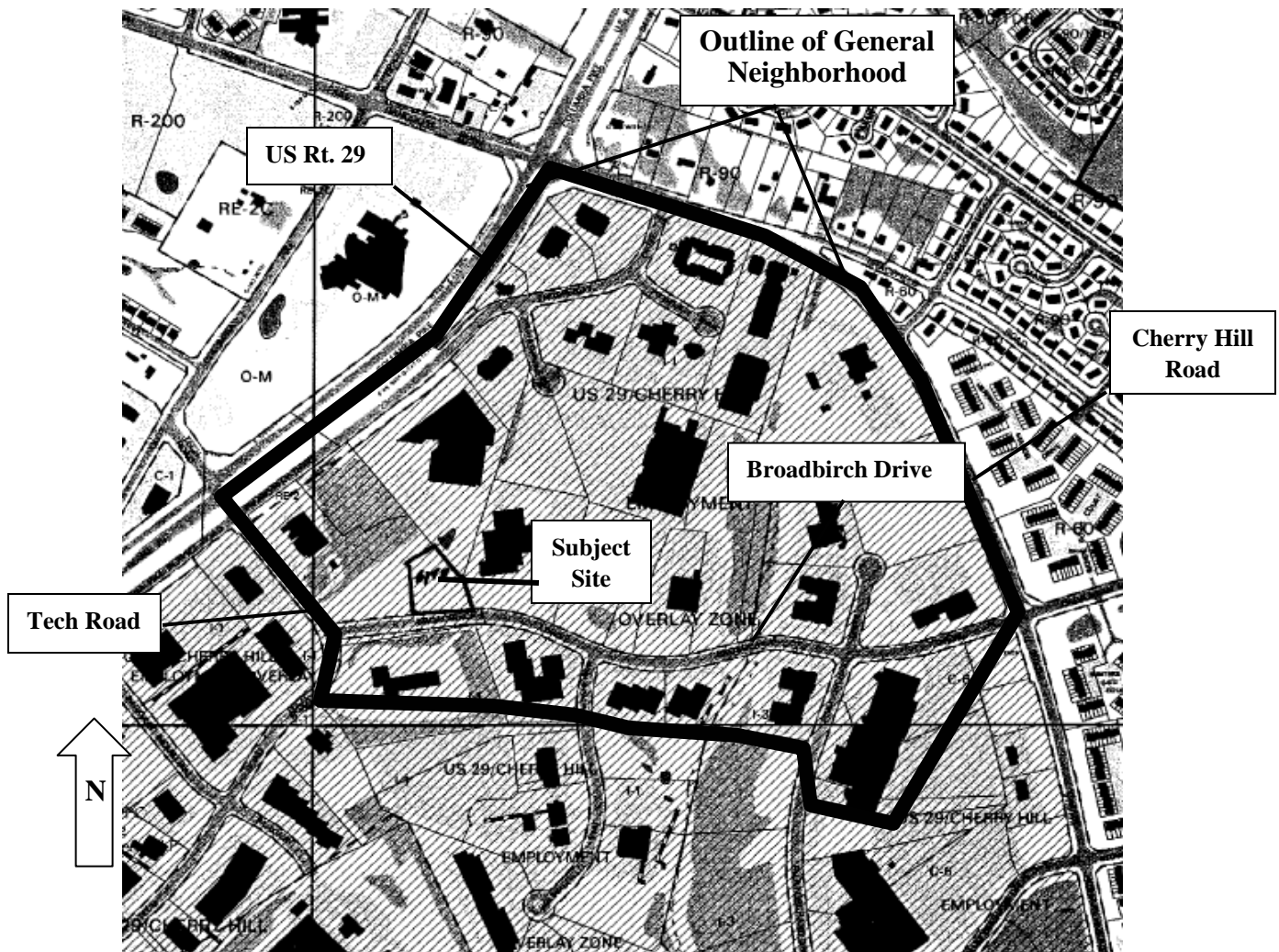


The property consists of 1.69 acres (73,779 square feet), and it currently is fenced and vacant. The site contains some trees and, in the southeast corner, there is a storm water management pond, according to Technical Staff. Exhibit 30. The property is irregularly shaped and slopes downward from rear to front, with its lowest points in the southwestern corner. The lot has a right-of-way frontage of approximately 288 feet along Broadbirch Drive. The vacant site and its immediate surroundings are depicted in the following aerial photograph from the Technical Staff report (the approximate site boundaries having been superimposed by the Hearing Examiner):



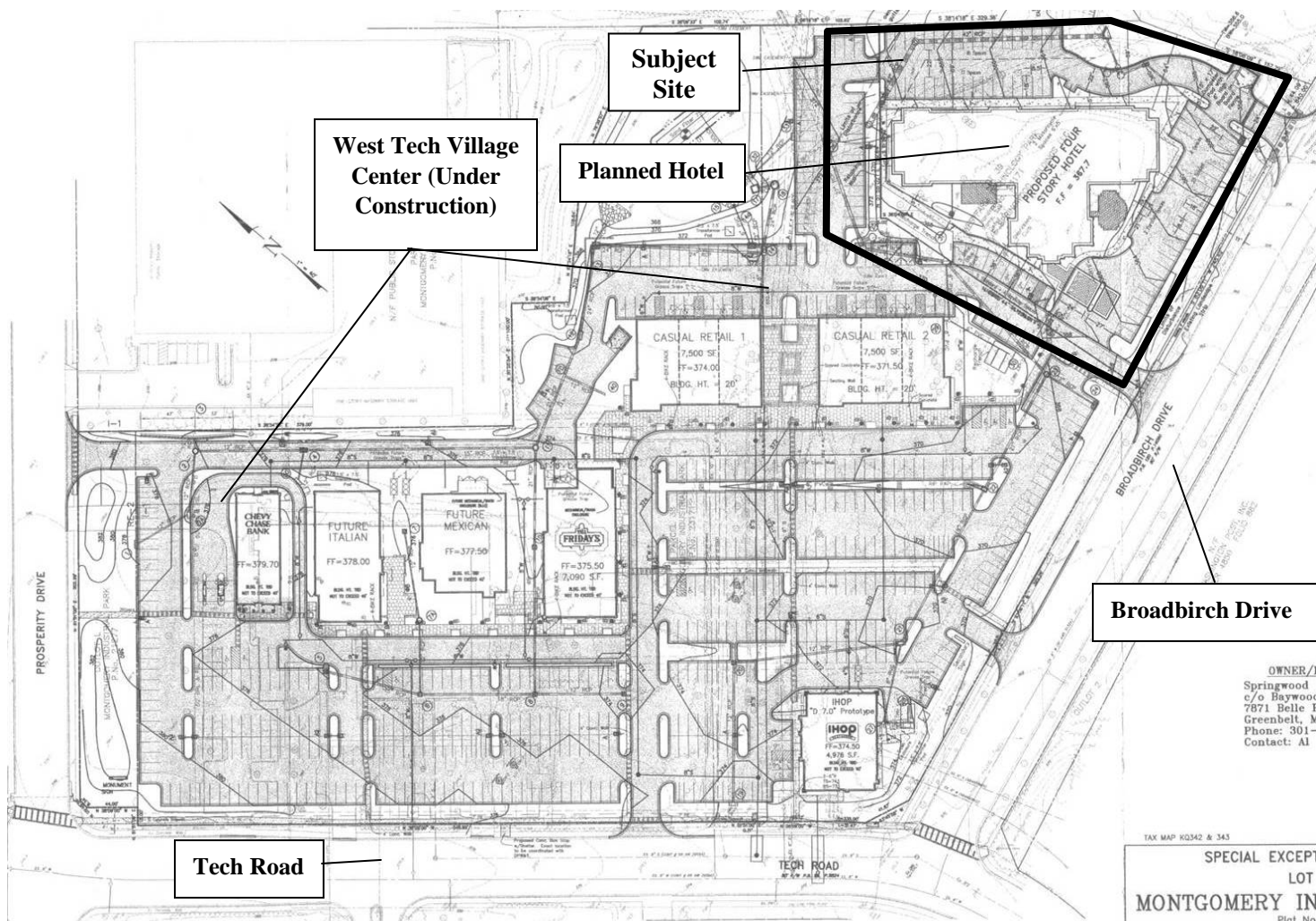
### B. The Neighborhood and its Character

Technical Staff defined the general neighborhood as “that portion of the Cherry Hill Employment Overlay Zone bounded by U.S. 29 (Columbia Pike) on the northwest, Cherry Hill Road on the north and northeast, Broadbirch Drive on the south, and Tech Road on the southwest, as well as all the properties fronting [on] Broadbirch on its south side.”<sup>2</sup> Petitioner accepted this definition of the general neighborhood (Tr. 66-67), as does the Hearing Examiner. The general neighborhood is outlined below on the vicinity map attached to the Technical Staff report.



<sup>2</sup> Technical Staff appropriately notes that the definition of the “general neighborhood” differs from the definition of the “market area” required by Zoning Ordinance §59-G-1.25 to determine the County’s need for another hotel. The general neighborhood is defined for the purpose of determining compatibility and the cumulative impact on the neighbors of adding a new special exception, while the “market area” is defined the purpose of determining the supply and demand for hotel space, and thus the community’s need for the special exception. In this case, the

The neighborhood as defined here is zoned I-1 (Light Industrial), I-3 (Technology and Business Park), C-6 (Low Density, Regional Commercial), and a narrow strip zoned RE 2 for Prosperity Drive. Exhibit 30, p. 4. Immediately to the west of the site, on Lot 38 of Montgomery Industrial Park,<sup>3</sup> is a property under construction for the “WesTech Village Corner,” a development of seven freestanding buildings containing restaurants, retail space, and a bank with a drive-in window. This property was the subject of Site Plan No. 8-05022, which was approved with conditions by the Planning Board in its Opinion dated August 9, 2005. This development can be seen below on Petitioner’s “composite site plan,” Exhibit 35.



market area is defined as the area within a three-mile radius of the subject property, which is a much larger area than the general neighborhood.

<sup>3</sup> A 24,899 square foot structure housing the International Fabricare Institute was previously located in the northwestern portion of Lot 38.

To the north of the subject site is a self-storage facility on Parcel N701 and an office building on Parcel N600, both fronting on Prosperity Drive, which parallels Columbia Pike. Immediately to the east of the subject site is a Gannett facility used for satellite transmission, located within the West-Farm Tech Park. Also within the West-Farm Tech Park are a Home Depot and a Courtyard by Marriott (hotel), located on the southeast corner of Prosperity Drive and Whitehorn Court. Opposite the subject site to the south across Broadbirch Drive is a wooded strip on Outlot E, and the new WSSC Consolidated Laboratory Facility on Parcel 970, which fronts on Tech Road. On the southwest quadrant of the intersection of Cherry Hill Road and Broadbirch Drive is a shopping center that includes a supermarket and Target. To the west of Tech Road, just outside the defined neighborhood, are office condominiums. Additional offices are located to the south across Broadbirch Road, on Parcel EEE and on Tech Road. *See* Petitioner's Statement, Exhibit 3.

Technical Staff notes that just outside the defined neighborhood is a Residence Inn by Marriott at the intersection of Cherry Hill Road and Plum Orchard Road, operating as a special exception (S-2552). The nearby hotels are shown on the Market Area Map (Exhibit 25(a)), and they are factors in the evaluation of "County Need," discussed in pages 46-48 of this report.

### **C. The Master Plan**

The property is located within the area covered by the *Fairland Master Plan*, approved and adopted in March 1997. In a memo dated January 4, 2006 and attached to Exhibit 30, the Community-Based Planning unit of Technical Staff observed that the subject area was designated by the Master Plan as the major employment area for the Master Plan. The area consists of over 400 acres of non-residential uses on property zoned I-1 I-2, I-3, I-4, and C-6 and covered by the overlay zone. "The master plan encouraged uses such as restaurants and banks . . . to support the businesses, employees and area residents. This proposed hotel is located next to a recently approved restaurant row with visibility to US 29." According to Technical Staff, the hotel use and location "are



consistent with the intent of the master plan, [and the hotel will be] . . . easily reached via the major road network and is a complementary use with the adjoining restaurants project.” Technical Staff also mentioned that the ongoing relocation of the FDA to a site adjacent to the employment area was recognized by the Master Plan, and that relocation will likely generate “clients /applicants/ and visitors from all over the country who may need places to stay overnight or longer.”

Petitioner’s land use planner, Victoria Bryant, testified that the Master Plan “supports a wide array of commercial uses and actually emphasizes a desire for a diverse set of commercial employment and housing in the area. And this would definitely encourage a more diversified [neighborhood] and be supportive of the existing uses in the area.” Tr. 83. Petitioner also observes, in its Statement (Exhibit 3), that the proposed Hilton Garden Inn will provide a hotel for the business traveler, which is a need generated by the “wide variety of employment opportunities” recognized by the Master Plan (p. 12). The Master Plan specifically calls for “the US 29/Cherry Hill Road Employment Area to become diversified and self-supporting by adding compatible uses . . .”. (p. 77). Petitioner argues that the proposed hotel will help to meet this goal of the Master Plan, and the Hearing Examiner agrees.

In sum, the Hearing Examiner finds that the proposed use is consistent with the *Fairland Master Plan*.

#### **D. The Proposed Use**

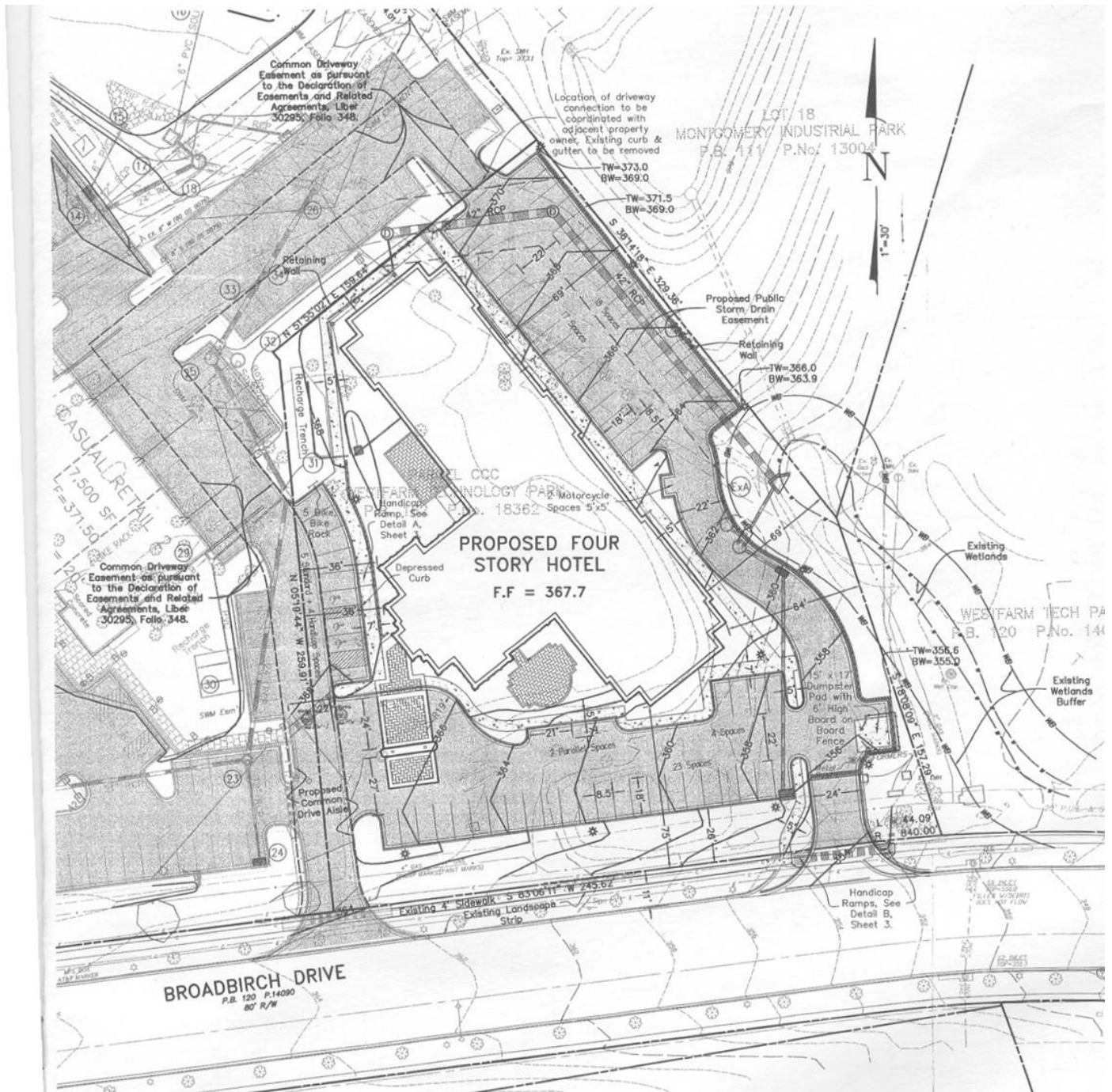
Baywood Hotels, Inc.<sup>4</sup> (“Baywood”) proposes the development of a four-story, 104-room Hilton Garden Inn on the subject site. Petitioner specifies (Exhibit 3, pp. 2-3) that the building will contain a total of approximately 67,850 square feet, with a total density on the property of .92 FAR. The total green area will be approximately 27,439 square feet, or 37.2 percent of the total land area.

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<sup>4</sup> Petitioner describes itself (Exhibit 3, p. 1) as “one of the fastest growing, privately owned hotel companies in the mid-Atlantic region.” According to Petitioner, Baywood owns and operates over \$100 million in assets, and its portfolio includes familiar brands such as Hampton Inn, Fairfield Inn by Marriott, Comfort Inn, Comfort Suites, Towne Place Suites by Marriott, Hilton Garden Inn, Holiday Inn, and Holiday Inn Express, as well as several independent hotels.

Access to the Property will be provided by three driveways, two along Broadbirch Drive (one of which is shared with the adjacent property to the west) and by a common driveway connecting to the adjacent property to the northwest. In accordance with Zoning Ordinance §59-E of the Zoning Ordinance, 73 parking spaces are provided. A bicycle rack to accommodate five (5) bikes will also be provided.

These features can be seen below on the revised Special Exception Site Plan (Exhibit 49(a)):



The Development Standards for the project were also set forth on the revised Site Plan:

**SUBJECT PROPERTY:** LOT 39, MONTGOMERY INDUSTRIAL PARK  
PLAT NO. 23171

**LOT AREA:** 73,779 SQ. FT. OR 1.69374 AC.

**ZONING CLASSIFICATION:** I-1 – US 29/CHERRY HILL ROAD EMPLOYMENT OVERLAY ZONE

**TAX ACCOUNT NUMBER:** 05-03484837

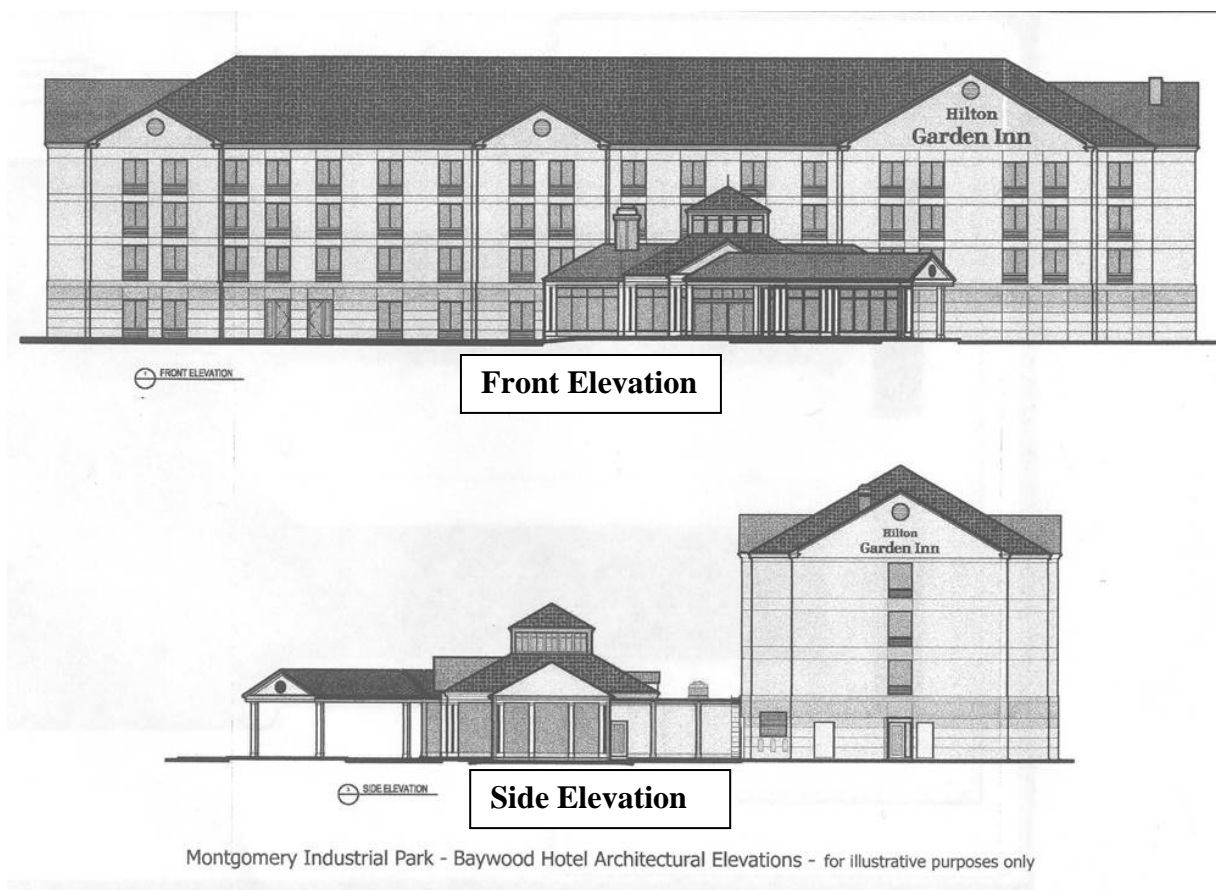
**PROPERTY ADDRESS:** 2200 BROADBIRCH DRIVE  
SILVER SPRING, MARYLAND 20904

**PROPOSED USE:** HOTEL (104 ROOMS) = 67,850 S.F.

#### DEVELOPMENT STANDARDS

	<u>REQUIRED/ALLOWED</u>	<u>PROPOSED</u>
<b>GROSS TRACT AREA</b>	No Minimum	73,779 S.F. Or 1.69374 AC.
<b>NET LOT AREA</b>	No Minimum	73,779 S.F. Or 1.69374 AC.
<b>BUILDING SETBACK REQUIREMENTS</b>		
ADJACENT TO ADJOINING I-1 59-C-5.33(b)(2)&(3)	0' OR 10' IF PROVIDED	10' (REAR) Min. 36' (SIDE - WEST) Min. 64' (SIDE - EAST)
ADJACENT TO STREET RW 59-C-5.33(a)(1)	10'	76'
<b>MAXIMUM BUILDING HEIGHT</b> 59-C-5.41(b)	120' OR 10 STORIES IN ACCORDANCE WITH 59-D-3 REVIEW	Max. 55' 1/4 Stories
<b>BUILDING AREA</b>	N/A	0.92 FAR or 67,850 S.F.
<b>PARKING SETBACK REQUIREMENTS</b>		
GENERAL 59-E-2.72	4' LANDSCAPE STRIP	4'
ADJACENT TO ADJOINING PARKING AREA 59-E-2.73	5' LANDSCAPE STRIP	5'
<b>SITE GREEN AREA</b>		
59-C-5.32: MIN. 10% OF GROSS TRACT AREA OR 7,378 S.F.		
59-C-5.4(b)(2): MIN. 5% OF NET LOT AREA OR	3,689 S.F.	
<b>TOTAL</b>	15% OR 11,067 S.F.	37.2% OR 27,439 S.F.
<b>LANDSCAPE STRIP ADJACENT TO STREET RIGHT-OF-WAY</b>		
59-E-2.71	10'	EXISTING - 26'
<b>OFF STREET PARKING AND LOADING</b>		
<b>INTERNAL LANDSCAPING</b> 59-E-2.73	5% or 908 S.F.	5.5 % or 1,000 S.F.
<b>PARKING SPACES</b> 59-E-3.6		
<b>USE:</b>		
HOTEL (104 ROOMS) 0.7 SPACES PER ROOM	73 SPACES	73 SPACES
NO BALLROOMS, PRIVATE MEETING ROOMS OR DINING AREAS ARE PART OF THIS BUILDING – 1 SPACE/100 G.S.F	0 SPACES	0 SPACES
<b>TOTAL</b>	73 SPACES	73 SPACES
<b>PARKING BREAKDOWN:</b>		
STANDARD (8'-6" X 18')	70 SPACES	69 SPACES
HANDICAPPED ACCESSIBLE	3 SPACES	4 SPACES
<b>TOTAL</b>		73 SPACES
MOTORCYCLE (5' X 5')	2 SPACES	2 SPACES
BICYCLE	4 BIKES	5 BIKES

The planned appearance of the hotel can be discerned from the illustrative elevations (Exhibit 38) shown below:

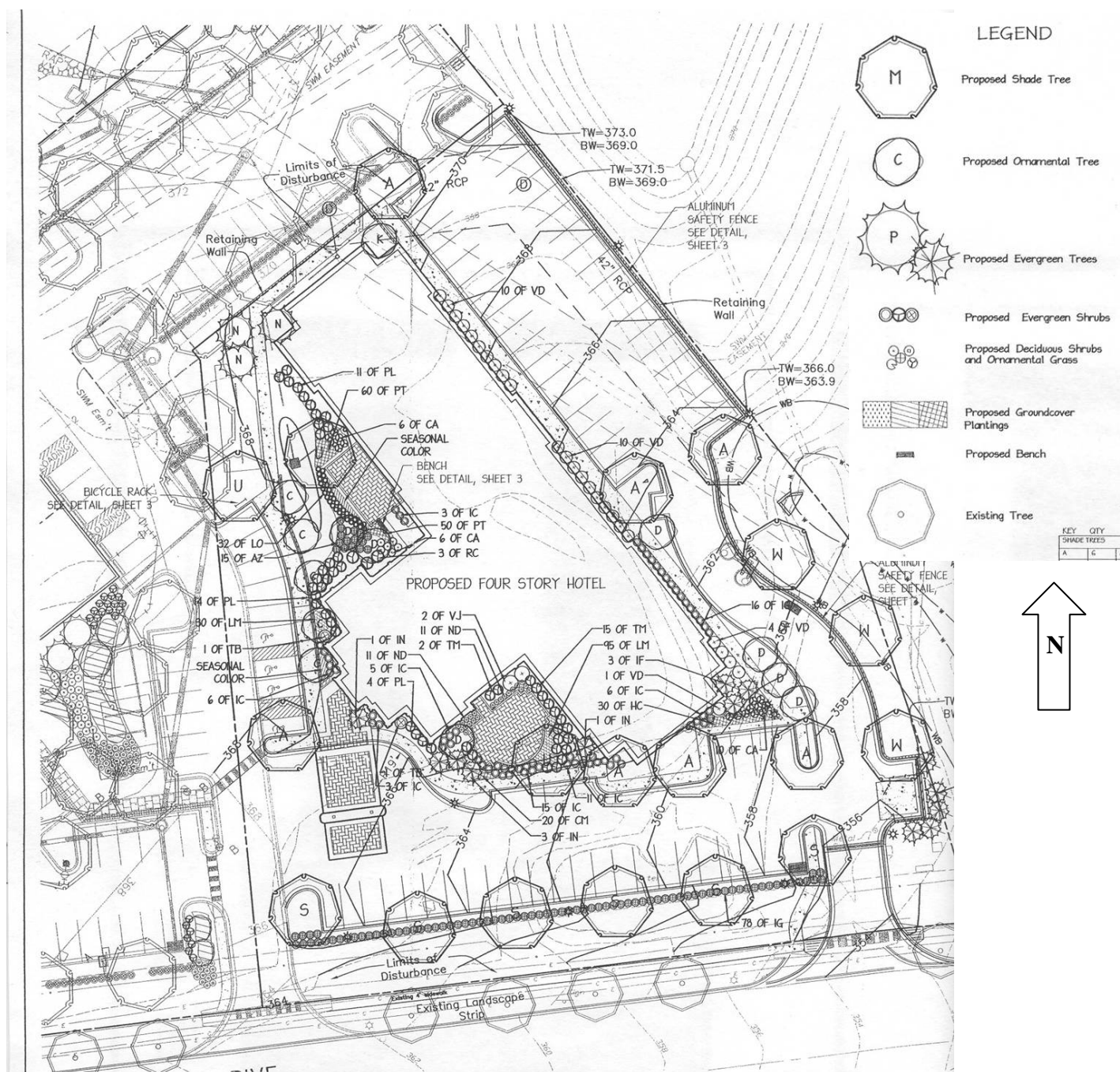


Petitioner indicates (Exhibit 3, p.2) that the hotel is targeted to the individual business traveler, as well as families traveling on the weekend. Baywood anticipates that approximately 60% of its business will be corporate/business guests, 30% tourists or guests visiting the area as a result of an event in downtown Washington, D.C. and 10% groups, weddings and social gatherings. Group tours are expected during the peak tour month of April. The average anticipated length of stay per guest is two nights. The anticipated average weekday occupancy is 80 percent, with an expected drop to approximately 60 percent during the weekends.

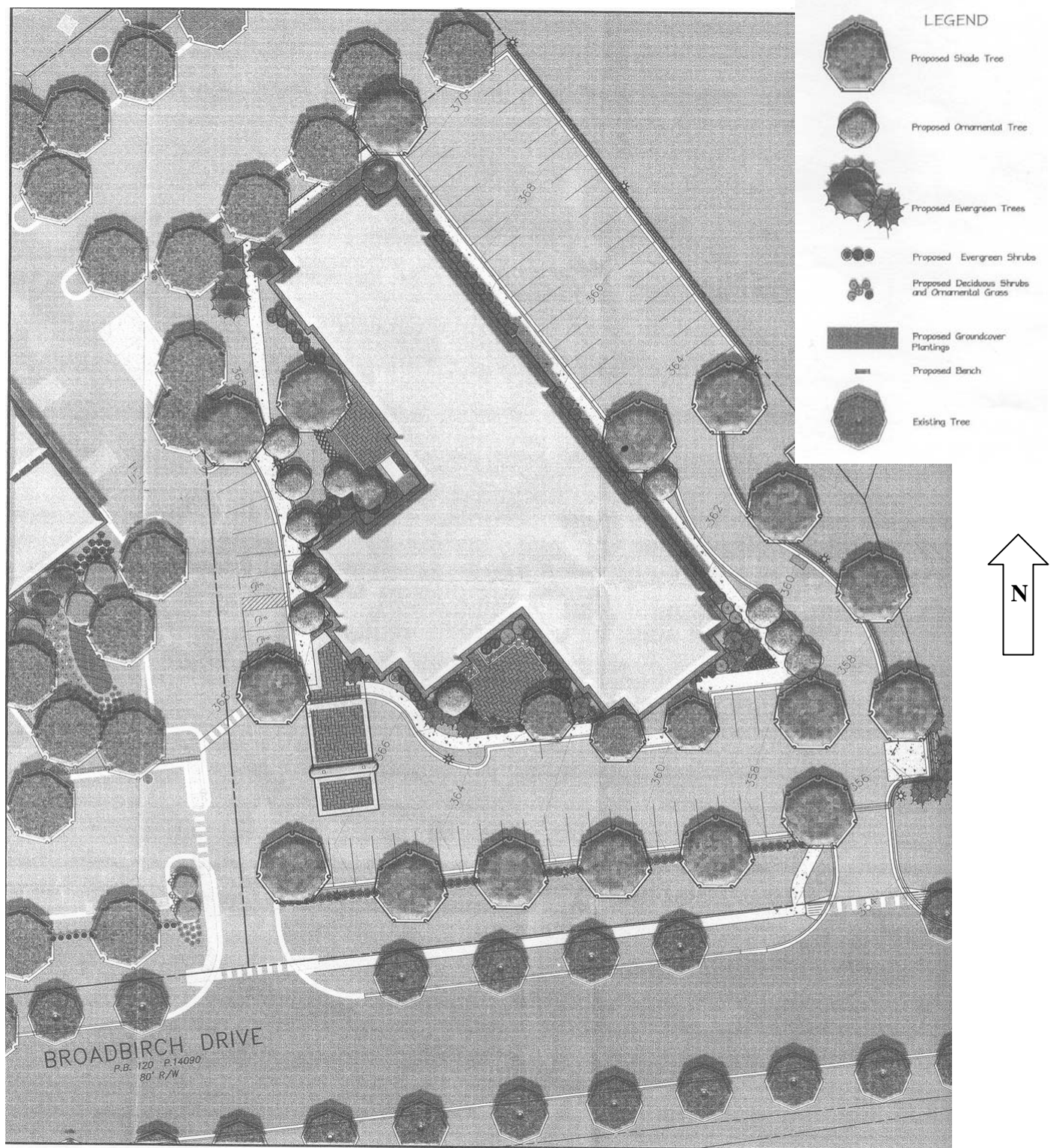
Floor Plans (from Exhibit 5), displayed on the following page show the first and second floors, including the Portico:



Petitioner revised its Landscape Plans in accordance with the directions of Technical Staff, which concludes in their report (Exhibit 30, p. 10), that “the proposed landscaping (and screening, including for the dumpster) is adequate and sufficient to safeguard the general community interest and welfare . . .” The revised Landscaping Plan (Exhibit 24) and its rendered version (Exhibit 40) are shown below:

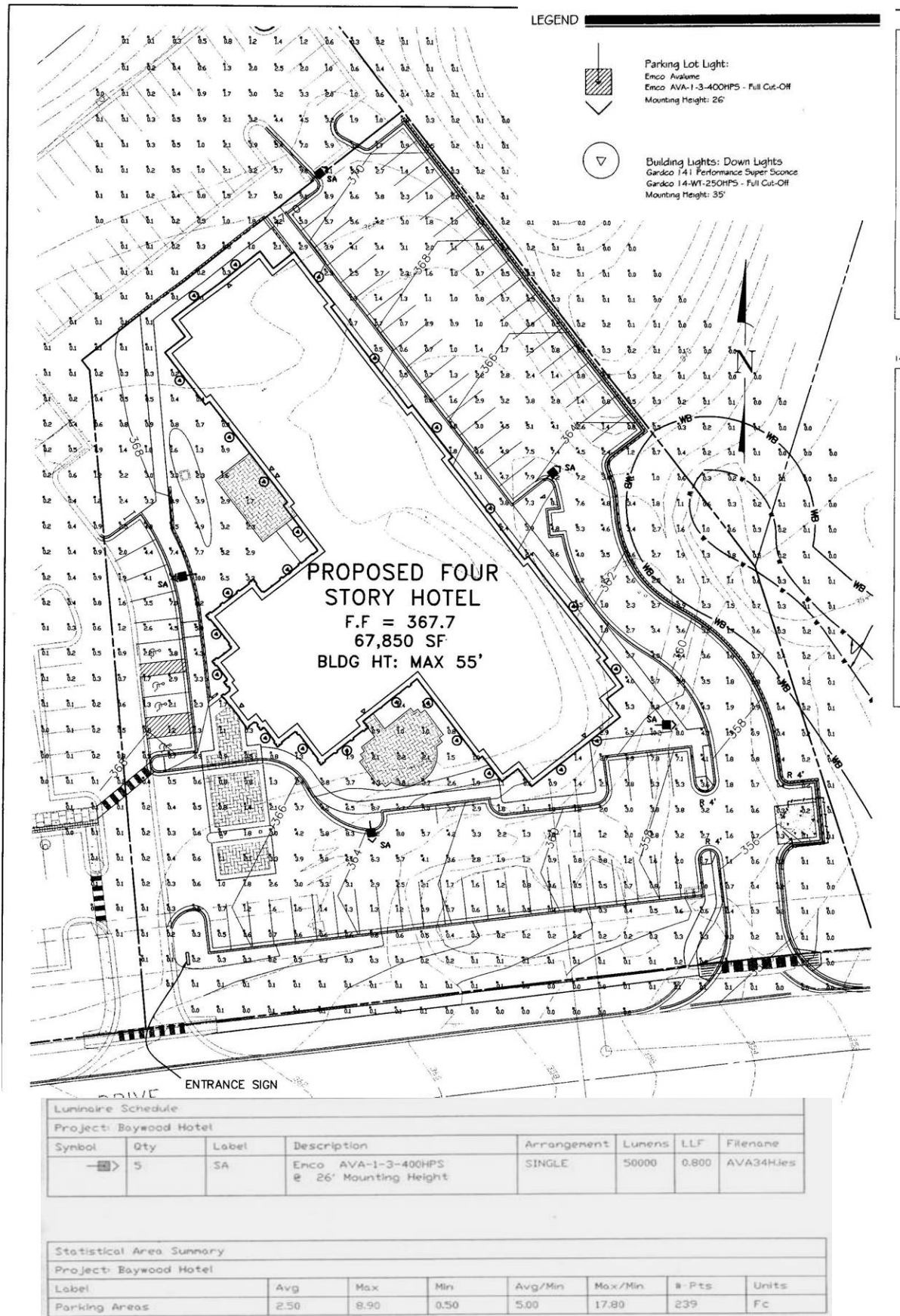






At the request of the Hearing Examiner, Petitioner revised its Lighting Plan (which includes a photometric study) to show all lighting proposed on the subject site, and the revised Lighting Plan

(Exhibit 50(a)) was reviewed and okayed by Technical Staff (Exhibit 52). It is shown below:





The Hilton Garden Inn will provide a cooked-to-order menu breakfast during the morning hours. Thus, the hotel will include a limited sized kitchen facility. No other meals will be served at the hotel. Subject to obtaining the required state and County alcoholic beverage licenses, the hotel is expected to have a small bar (5 to 6 seats) or alternatively, will host nightly or evening receptions for its guests. Exhibit 3, p. 3. Technical Staff reports being assured by Petitioner that there would be no meeting rooms and no suites. Exhibit 30, p. 7.

The hotel anticipates a total work force of approximately 25 employees, with a maximum of 12 employees expected to be on site at any one time. The primary employee shifts are 7:00 a.m. to 3:00 p.m., with approximately 12 employees on duty during that time, and 3:00 p.m. to 11:00 p.m., with approximately 4 employees on duty on this afternoon shift. There will be only two employees on site between 11:00 p.m. and 7:00 a.m. Guests may access their rooms either by entering through the main lobby or more typically, through one of the 24-hour card key controlled exterior doors into the residential corridors. A security guard will be retained to provide security at night. At all hours there will be at least one manager on duty. Exhibit 3, p. 3.

It is anticipated that deliveries to the hotel will be relatively minor, given the limited foodservice. All normal deliveries will be made by a step-van. Given the limited nature of the deliveries, a loading dock is not necessary; instead, loading will occur through a side door of the hotel. Laundry generated by the hotel will be washed on site, thus eliminating an additional outside service which would generate more deliveries to the site. The hotel laundry room will consist of two washers and three dryers. The dumpster to serve the property is located in the southeast corner of the site, setback approximately 60 feet from the street, thus minimizing any interference with the use of the property and visibility to the public. In addition, the dumpster will be screened with a six foot high board-on-board fence. Trash will be picked up three times a week. Exhibit 3, p. 3.

**Transportation Issues:**

Transportation Planning staff analyzed the traffic which would be generated by the hotel's activities and determined that the application satisfies Local Area Transportation Review (LATR) requirements without the need for a traffic study. *See* Memo attached to Exhibit 30. This conclusion is based on the fact that the overall area of which the subject site is a part was approved for subdivision already under Preliminary Plan No. 1-91038, and the approval of its Adequate Public Facilities test remains valid through July 31, 2009. Of the 107,196 square feet of office density contained in that subdivision, Petitioner purchased 34,118 square feet of approved office density for the planned hotel. Applying the Institute of Transportation Engineers (ITE) Trip Generation Manual, Land Use Code 311, for Suites and Hotels, engineer David Nelson determined that the planned 104 hotel units would generate 50 morning peak hour trips (rate = 0.48 trips per room) and 57 evening peak hour trips (rate = 0.55 trips per room). According to Mr. Nelson, whose conclusion was accepted by Transportation Planning staff, that trip rate translates to the equivalent of 34,118 square feet of office space, and therefore Petitioner is within the already approved APF standard for the subdivision. There is no evidence to the contrary in the record, and the Hearing Examiner therefore accepts this conclusion and has proposed a condition in Part V of this report providing that "[t]he hotel on the site must not exceed 104 rooms, which is equivalent to 34,118 square feet of general office use."

Transportation Planning Staff also requested two additional conditions which the Hearing Examiner has recommended in modified form. One requires Petitioner to install a bus shelter on Broadbirch Drive in the vicinity of the hotel. The precise location and details of the bus shelter will be determined at the time of site plan review, after coordination between Petitioner and the Montgomery County Department of Public Works and Transportation/Division of Transit Services. The second condition seeks to have Petitioner, at the time of site plan review, provide for additional sidewalks, handicap ramps (meeting Americans with Disabilities Act Standards) and crosswalks, both

on and off the property. Since it is the Planning Board that determines Site Plan Review, the condition recommended by the Hearing Examiner calls for Petitioner to report back to the Board of Appeals, any such additions ordered by the Planning Board.

Transportation Planning Staff also received a sight distance evaluation form signed and sealed by Petitioner's engineer indicating that sight distances are adequate (Exhibit 22). The form must be approved by Department of Public Works and Transportation prior to Site Plan review. Technical Staff noted in their report that proof of ingress/egress easements must also be provided, that the northern drive aisle must align and be 20 feet wide, per requirements of the Fire Marshal, that a site plan amendment for the adjoining property may be necessary to achieve such alignment, and that additional handicapped ramps may be necessary. Petitioner's final revised Special Exception Site Plan contains deed references for each of the common driveway easements. There is also a letter in the file from the owner of the property to the north expressing his willingness to modify his site plan to properly align the driveways (Exhibit 26). The remaining details will be cleared up at Site Plan Review, to which this special exception is subject for the reasons set forth in Part I of this report.<sup>5</sup>

The number of required parking spaces is determined by Zoning Ordinance §59-E-3.7, which provides that hotels (not located a central business district or a transit station development area) must provide "seven-tenths of a space for each guest room, plus 10 spaces for each 1,000 gross square feet of area used for ballrooms, private meeting rooms, dining rooms and similar places of assembly." The planned hotel will have 104 rooms and no ballrooms or other places of assembly. It thus must provide 73 parking spaces (0.7 X 104). Petitioner does, in fact, provide 73 parking spaces, four of which are

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<sup>5</sup> Technical Staff notes that it is unusual for a special exception to also go through site plan review. Most zones in the Zoning Ordinance exclude special exceptions from site and project plan review because such multiple reviews are considered redundant. Site plan review is necessary in this case because the proposed hotel, at a maximum of 55 feet and four stories, is over three stories and 42 feet, and thus, according to Zoning Ordinance §59-C-5.31(b) must comply with the special regulations for the I-1 zone found at §59-C-5.41, including site plan review. In order to ensure that at the time of site plan approval there would be as few changes as possible from the special exception site plan and landscaping and lighting plans approved by the Board of Appeals for the special exception, Technical Staff brought the special exception plans to the Development Review Committee, which normally reviews site plans but not special exceptions, and also Staff consulted with the site planner who reviewed the WesTech Village Corner site plan for the property immediately to the west of the subject site.

handicapped accessible. In addition, there are five bicycle and two motor cycle spaces provided.

Petitioner therefore meets the requirements for parking spaces.

**Environmental Issues:**

Environmental Planning Staff reviewed the plans for the proposed hotel and made the following observations in a memorandum dated January 9, 2006, and attached to the Technical Staff report (Exhibit 30):

**Forest Conservation:**

The subject site (Lot 39) is exempt from forest conservation under Chapter 22A-5(k), which is the grandfathering provision, because the property is subject to Preliminary Plan No. 1-91038 approved in 1991 for the 200-acre site then known as West\*Farm Technology Park. Lot 39 is also covered by Natural Resources Inventory/Forest Stand Delineation (NRI/FSD) No. 4-05011, issued November 18, 2004), FCP exemption No. 4-02049E for Parcel CCC, and Final Forest Conservation Plan No. 8-05022 issued July 7, 2005, that covers the broader Montgomery Industrial Park.

**Environmental Guidelines:**

The NRI/FSD shows a small area of wetlands at the eastern end of the property. There, is no encroachment into this sensitive area although the Special Exception Site Plan shows parking very close to the buffer area, and Petitioner has agreed to build the parking area with a retaining wall to protect the wetland and buffer area. That retaining wall is noted on the revised site plan (Exhibit 49(a)), and a condition is recommended in Part V of this report specifying that “t[]here must be no encroachment into the wetland buffer areas except for necessary stormwater management outfalls, as approved by DPS.”

This plan also calls for 37.2% green space, which is slightly in excess of the 35% green space required by the I-1 zone. Environmental Planning Staff also notes that the property will be improved

with a large number of landscaping trees around the building, in the parking lot and along the property boundary, as can be seen in the Landscape plans reproduced on pages 14 and 15 of this report.

Environmental Concerns:

The subject site does have an unusual environmental condition. The International Fabricare Institute, a previous occupant of the area, used a hazardous chemical, tetrachloroethylene (PCE)<sup>6</sup>, in its dry-cleaning and related activities. As a result, the Maryland Department of the Environment (MDE) has required monitoring and remediation work on the property since the 1990's to remove remnants of the PCE. Based on data generated from soil and groundwater monitoring, MDE determined that the levels of contaminants in soil and groundwater in the area influenced by the remediation system had been reduced to levels such that further treatment would not be effective. MDE therefore authorized the shutdown of the remediation system in April of 2003, to allow evaluation of the continued need for active remediation. This risk assessment identified no unacceptable potential risk, and MDE placed no constraints on the development and use of the property.

Groundwater monitoring continued, and a March 2005 report on groundwater monitoring done for the subject site (Lot 39), noted that the levels of PCE in the three wells on Lot 39 were above the .5 ppb Maximum Contaminant Level allowed for drinking water by the Environmental Protection Agency. However, according to Environmental Planning Staff, the contamination is currently confined to the upper aquifer, and groundwater is not utilized as a drinking water source in the area. MDE also concluded that the possible intrusion of contaminated vapors into buildings constructed over the contaminant plume should not present a health risk at the levels currently known to exist under the site.

Nevertheless, continued monitoring is necessary to track the PCE levels in the soil and groundwater and to assure that conditions remain stable. GB, LLC (the owner of the adjacent restaurant park site and previous owner of the subject site) retains general legal responsibility for all

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<sup>6</sup> The acronym, PCE, comes from another name for the same chemical, "perchloroethylene." It is also known as "PERC."

obligations with respect to environmental remediation, but Baywood and GB, LLC have a contractual arrangement under which Baywood promises to allow access for monitoring and to not disturb, or in any way interrupt, the monitoring of the wells. The two monitoring wells are noted on the revised site plan (Exhibit 49(a)), and the Hearing Examiner has proposed a condition in Part V of this report, at the suggestion of Technical Staff, providing that “Petitioner must not disturb or in any way interrupt the groundwater monitoring wells at the site and must allow access for monitoring.”

Based on these circumstances, Environmental Planning Staff concluded that the proposed use will generate no objectionable noise, dust, vibrations, fumes or odor that would adversely affect surrounding users.

Stormwater Management:

The Montgomery County Department of Permitting Services (DPS) has approved a Stormwater Management Concept Plan for the site (Exhibit 10). An existing regional stormwater management facility, previously approved as part of a stormwater management plan for WestFarm Technology Park, will accommodate stormwater management for the subject property. Water quality treatment will occur on site in a sand filter system that will receive stormwater runoff from paved portions of the facility and convey them to another filter in the northeast portion of the facility. Storm drains from the roofs will convey roof runoff directly to dry wells.<sup>7</sup> At the suggestion of Technical Staff, the Hearing Examiner has recommended a condition that Petitioner must comply with the conditions of DPS’s approved Stormwater Management Plan.

Based on the circumstances summarized above, Environmental Planning Staff recommended approval of the special exception, with conditions the Hearing Examiner has modified and adopted.

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<sup>7</sup> According to Environmental Planning Staff, MDE confirmed in April of 2005 that the infiltration of stormwater would not flush or increase the movement of contamination into the groundwater via the sand filter and dry wells, nor would it present any danger to personnel if they augured into the sand filter as part of the inspection process. MDE also concluded that the levels of contamination in the soil were not high enough to have impact on site workers encountering subsurface soils on a casual basis. Accordingly, MDE had no objections to the stormwater plan as originally submitted.

### III. SUMMARY OF THE HEARING

Petitioner called five witnesses to testify at the hearing: Al Patel, the president of Baywood Hotels, Richard Fenstermaker, the vice-president of operations, Paul Newman, an expert in site development, Victoria Bryant, a landscape architect and land planner and David Nelson, a transportation consultant. There were no opposition witnesses.

#### A. Petitioner's Case

##### 1. Al Patel (Tr. 15-21):

Al Patel testified as the president of Baywood Hotels, Inc. Baywood is a family real estate company that has been in business for 30 years in the Washington, D.C. metropolitan area. It manages hotels mostly in the Baltimore-Washington area, but also throughout the country.

Baywood franchised the Hilton Garden Inn brand at this location and will pay a monthly licensing fee to Hilton based on gross monthly receipts. Baywood Hotels will also be the management company running the hotel at this location.

The hotel will be a business-oriented hotel and thus will have primarily business travelers throughout the week. There will be no meeting or conference rooms at the facility, and there will be a very limited food service, primarily consisting of a breakfast offering. Because business travelers typically stay more than one night, there is less checking in/checking out of the hotel and generally a lower level of activity. There's no outdoor pool or any amenity such as that.

The hotel will be an "EIFS"<sup>8</sup> stucco building with a gabled roof and a residential feel. It will be four stories tall and have 104 guest rooms. A needs analysis performed by a consultant determined that there was a need for the proposed hotel. The study projected that occupancy after three years, which is considered the stabilized period, would be approximately 80 percent, and this was based on several factors, including a lack of similar products in the neighborhood.

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<sup>8</sup> "EIFS" stands for Exterior Insulation and Finish Systems. The product is also called "synthetic stucco."

Within a three mile radius, there are only three real primary competitors for this hotel, and within that three mile business market area, there are numerous demand generators that actively require room nights in the area. The occupancy rates of the three primary competitors in the area range from approximately 75 to 78 percent right now. Baywood also anticipates an increased demand from some new businesses in the area in the next two to three years, including the East County Center for Science and Technology and the FDA expansion, which will result in approximately 7,000 to 8,000 new employees being relocated into the immediate market area.

The rule of thumb is that when there is 65 percent occupancy and above in the market area, developers will start actively seeking hotel development opportunities. This area is doing approximately 75-78 percent occupancy currently, and increased demand is projected in the near future. When you have 75-78 percent occupancy overall, that means at certain periods the available hotels will be completely full. Looking at Monday through Thursday, there were no rooms available approximately 26 weeks of the year, and the existing hotels were displacing about 12,000 guests from the area.

Thus, the need exists for the proposed use due to an insufficient number of similar uses presently serving the existing population concentrations in the county.

2. Richard Fenstemaker (Tr. 21-26):

Richard Fenstemaker testified that he is the senior vice-president of operations for Baywood Hotels, Inc. Baywood proposes to build a 104 room Hilton Garden Inn, catering primarily to the business traveler for an anticipated average stay of two to three days. There will be 52 two-bedded rooms, each having two queen beds; 46 king-bedded rooms; and 6 handicapped king-bedded rooms, all accessed by interior corridors. There will be no conference facilities, and the only meal offered will be a breakfast service. There will also be an indoor pool, a fitness center and a business center.



Guests typically pull up in front, come in and register, and then go back out to their cars, drive to their parking near one of their rooms or one of the entrances that is convenient to the room, and take their bags up to their room.

There will be about 25 employees (18 full time employees and another five to seven part-time) at the hotel. Typically, there are three shifts, with probably 12 employees present on the first shift. There may be four employees on the second shift and probably two overnight, a security guard, and typically a manager on duty at all times. The 7:00 a.m. to 3:00 p.m. shift with about 12 employees would include the front office staff and the housekeeping staff. The 3:00 p.m. to 11:00 p.m. shift would include mainly front office personnel. There will be some part-time employees on the weekends, and there will be two employees on the night shift with the security guard.

Typically, deliveries are during off-peak periods using a step-van through a side entrance of the hotel, and sometimes the interior front door. The fact that this is a limited food restaurant reduces the number of deliveries to two or three a week.

### 3. Paul Newman (Tr. 27-62):

Paul Newman testified as an expert in site development.<sup>9</sup> He was project manager for the adjacent restaurant park referred to as “the Village Corner,” and he did much of the design work of Orchard Center, which is the retail center in this area. He is currently working on another project a block south on Route 29 at Industrial Parkway, so he is familiar with the area.

Mr. Newman was employed by Baywood Hotels to perform the site layout and for the proposed hotel. He laid out the site based on site restrictions, existing conditions, zoning setbacks and the Hilton Garden Inn requirements. Hotels are permitted as special exceptions within the I-1 US 29 Cherry Hill Overlay Zone.

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<sup>9</sup> The witness has many years of experience working with an engineering firm, but does not have a college degree (though he “spent four years studying civil engineering curriculum at Washington State University,” Tr. 28.); nor is he certified as a professional engineer by the State of Maryland. He was therefore not accepted a qualified expert in civil engineering. However, the Hearing Examiner found that he did have expertise in site development, and could therefore assist the fact-finder with knowledge beyond the ken of laymen in this area.

Mr. Newman described the surrounding area, the site and the proposed layout which Petitioner is seeking. To the southwest of the site is a restaurant park developed by another owner. It is currently under construction, and it will consist of two retail buildings and five “pad sites,” four of which will be restaurants. Immediately to the east of the subject site is the Gannett Building, which has a number of satellite dishes. Immediately to the north of the property is an existing office building. To the west of it, the International Fabricare Institute used to be located. Across Broadburch Drive, is a parcel that's owned by WSSC and currently houses their water laboratory. Additional offices are located to the south as well. Mr. Newman agrees with Technical Staff's definition of the general neighborhood.

Mr. Newman further testified that the site itself is 1.69 acres, 73,000, plus, square feet. The nearest single family neighborhood is about a half mile away across Route 29 which is to the northwest.

At the request of Technical Staff, the site plan was modified by rotating the planned hotel location. Petitioner re-oriented the planned building so that it will be parallel to the northeasterly property line and parallel to the storm drain line. That put the front of the building at the southwesterly portion, and they will thus be able to use a common drive aisle for the benefit of both the restaurant park and the hotel site. The revised site plan has a common drive aisle both on the west and on the northwest, and has a second driveway entrance on Broadburch Drive. There will be circulation going through the common drive aisle, through the rear parking area and back around out through the eastern entrance onto Broadburch Drive, and there will be circulation as well through the western common entrance through the parking adjacent to Broadburch Drive and then back out through the eastern entrance to Broadburch Drive.

According to Mr. Newman, the other issue was the small wetland at the outfall of the existing storm drain pipes. With permission of the County, Petitioner will relocate this storm drain line right along the northeastern property line and parallel to it so it outfalls in essentially the same location as it is outfalling right now. That will minimize any disturbance of the wetlands themselves, which is a very small area on the eastern part of the property.

Mr. Newman testified that a dumpster pad would be located at the far eastern end of the parking area that is parallel to Broad Birch Drive. That would allow a dump truck to come in through the common access drive, make a right-hand turn parallel to Broad Birch Drive, approach that dumpster straight on, then be able to back up and turn back out to the right onto Broad Birch Drive, minimizing the activity of the dump truck trying to negotiate a clear path.

Mr. Newman further testified that the building area itself is 67,850 square feet, with a FAR of .92. The overall height of the building is not to exceed 55 feet or four stories. The floor plans have not changed, but the elevations changed when the building was rotated, and a new elevations plan was submitted as Exhibit 38.

According to Mr. Newman, DPS approved Petitioner's storm water concept plan. The storm water management quantity control for the whole Westech Technology Park is controlled in a regional facility that's located to the southeast, and it actually provides storm water quantity control for the entire site. Petitioner was asked by the County to redirect the roof water into a recharge trench to promote infiltration, and so that is part of Petitioner's storm water concept. The runoff from the parking area, the asphalt area, will go through a "Bay Saver" device, which is a water quality structure, and it will discharge at the same location that that relocated storm drain pipe will discharge.

Mr. Newman testified that the proposed building will satisfy the specific requirements of the I-1 zone pursuant to 59-G-2.33 and 59-G-1.21(A)(2), as well as all the applicable development

standards. Based on the number of parking spaces provided on the site, a minimum number of three handicapped spaces are required as per the code. Petitioner actually provides four handicapped parking spaces, all of which are van accessible. They are located immediately in front, to the southwest of the hotel entrance, and the sidewalk and curb in front of all those spaces will be depressed so that the people who come out of their handicapped parking spaces can go onto a sidewalk and get into the building. There will also be a crosswalk with handicapped ramps on either end.

There are two monitoring wells shown on the site plan because the former owner, International Fabricare Institute, used dry cleaning chemicals and the Maryland Department of the Environment (MDE) found small amounts of the chemical “PERC”<sup>10</sup> in the ground water. MDE required International Fabricare Institute to set up monitoring wells around the site which is now the restaurant park site. There are two monitoring wells that straddle the property line, and there are a number of other monitoring wells across Broadbirch Drive to the south. There are no requirements for Petitioner to do any monitoring.

A public facilities review for the area was conducted as part of the underlying Preliminary Plan of Subdivision No. 1-91038, which was determined to satisfy the adequate public facilities ordinance. The property is served by public water and sewer, rated S-1 and W-1. The water supply is in Broadbirch Drive, and there is an existing WSSC sanitary sewer about 300 feet down the road. Petitioner will not have to go to subdivision again.

#### 4. Victoria Bryant (Tr. 63-86):

Victoria Bryant testified as an expert in landscape architecture and land planning. Her responsibility was to review the landscape plan, evaluate compliance with the zoning ordinance, and assess the plan's compatibility with the surrounding area.

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<sup>10</sup> “PERC” is another name for “PCE,” the chemical tetrachloroethylene, also known as perchloroethylene.

Ms. Bryant agrees with Technical Staff's definition of the general neighborhood as "that portion of the Cherry Hill Employment Overlay Zone bounded by U.S. 29 (Columbia Pike) on the northwest, Cherry Hill Road on the north and northeast, Broadbirch Drive on the south, and Tech Road on the southwest, as well as all the properties fronting Broadbirch on its south side."

Ms. Bryant testified that the property is in Westech, and is proposing 37% green space, which exceeds what is required in the area. Ms. Bryant introduced a rendered version of the landscape plan, and testified that the landscaping perspective in relation to Broadbirch Road (*i.e.*, the streetscape) is the thing the subject site shares most in common with the adjacent Westech Restaurant Park. There are existing street trees and a sidewalk that will be maintained. In addition, Petitioner will maintain the same setbacks from the property line that were approved for the Westech Restaurant Park. There is a 26 foot setback, 20 feet of which is an existing public utility easement, 6 feet of which is a landscaping strip that includes street trees and a three foot hedge along the front of the parking spaces. The plant material is identical. The trees are 2-1/2 inch caliper sugar maples; green mountain and shamrock holly create the three-foot group hedge. And Petitioner will continue the same layout design of filling the parking islands with shade trees to three inch caliper trees similar to what's on the Westech property. Additional trees will also be added along the common drive, and there will be a foundation planting for the building itself consisting of some deciduous and evergreen shrubs, flowering trees, and some additional deciduous shade trees. They help to create some of the outdoor spaces that are provided.

In Ms. Bryant's opinion, the property satisfies the requirements of the I-1 Zone in terms of landscaping.

Ms. Bryant also introduced a revised lighting and photometric plan, which was changed at the request of Technical Staff so that Petitioner would be using the same light fixtures (five pole lights) as were planned for the adjacent Westech property. According to Ms. Bryant, no light gets

above the 90 degree angle from the fixture and there is one foot candle or less at the property line. The I-1 Zone does not specify a footcandle limit. Petitioner is basing the 1 footcandle standard upon what was approved by the Planning Board for the Westech Restaurant Park, which was 1 foot candle at the property line. Ms. Bryant feels the photometric plan does well in meeting what the county requires, which is difficult when you have parking adjacent to the property line and a shared common driveway, and you must consider safety. The mounting height for all the fixtures is 26 feet, which in Ms. Bryant's opinion is sufficient to provide for safety and lighting. [At the Hearing Examiner's request, Petitioner submitted a revised lighting and photometric plan showing the lights mounted on the hotel walls, as well as the parking area pole lights.]

Ms. Bryant further testified that the planned hotel is generally typical, other than the fact that there's not a conference center or restaurant inside, and the pool is indoors. It's more suburban, and it would have fewer non-inherent characteristics that might impose upon the community. It is modest in scale (up to 55 feet in height where the zone allows for 120 feet) and it's very much in keeping with the surrounding structures. It has an EIFS type stucco, a material on the outside that's going to be used in similar projects and is used on the restaurant park next door. It provides limited services as a business hotel. There's no restaurant on site other than the limited breakfast service. It has limited outdoor amenities. There will be less lighting than one typically associates with a hotel, although it will be safe. Noise is also going to be limited because of the lack of outdoor amenities. You won't have people in the pool making noise. There is adequate transportation capacity available, and the landscape requirements have been satisfied. Stormwater management will be in place. The plans have been revised to avoid adverse effects to the wetlands area. MDE, Maryland Department of Environment, finds no encroachment into the wetlands, "and they said they see no real issue with issuing a permit." In sum, the inherent effects of the planned Hilton Garden Inn will probably be more limited than you'd typically find with a hotel of this nature. The non-inherent

conditions include the monitoring wells, the wetlands and the shared driveway. In Ms. Bryant's opinion, none of these non-inherent characteristics impact adversely on the community or warrant denial of this petition.

Ms. Bryant testified that the applicable Fairland Master Plan "supports a wide array of commercial uses and actually emphasizes a desire for a diverse set of commercial employment and housing in the area. And this would definitely encourage a more diversified [neighborhood] and be supportive of the existing uses in the area." Tr. 83. According to Ms. Bryant, the architecture is compatible with the surrounding area, and the special exception will not be detrimental to the use, peaceful enjoyment, economic value, or development of surrounding properties or the general neighborhood and will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity. "It compliments the surrounding uses. It provides obviously a hotel for the surrounding office and it provides customers for the adjacent restaurant park. . . . [N]o objectionable noise or fumes will be created from this, . . . the illumination or glare will be minimized by using shoebox full cutoff lights and there will be no physical activity outside because it has an indoor pool." Tr. 84. The closest residential area is a half a mile away.

In Ms. Bryant's opinion, "the site is ideally situated -- suited for a hotel. It provides a diverse need for the office park and it compliments the I-1 zone in terms of the office uses in the area." Tr. 85.

5. David Nelson (Tr. 87-97):

David Nelson testified as an expert in traffic engineering and transportation planning. Mr. Nelson opined that "the key finding that we would make on this site . . . is that it's complimentary and it's integrated into the restaurant park." The site has its own an access point directly to Broadbirch Drive, a 24 foot drive aisle and circulation completely around the building, which is key for circulation and fire protection. It is also integrated into the restaurant park with the other two

access points, so the site has three entrances. Instead of having a stand alone use where all the traffic has to go in and out of the site to go into the adjacent one, it is integrated so that you have actually fewer trips on the network than you would if it were not complimentary and supplemental.

In Mr. Nelson's opinion, the circulation is safe and efficient. The main finding of adequacy regarding the traffic level for this property was made as part of the overall preliminary plan which was previously referred to as 1-91038. That was actually the second revision of the preliminary plan for West Farm. It was dated 1991. At that time it was called the West Farm Technology Park, and the preliminary plan for the all the I-1 parcels was approved for the total density of 1,313,921 square feet. A finding of adequacy was made for the entire I-1 density at that time. The approved traffic cap was linked to office density. According to Mr. Nelson, the subject site plan and any other plan that comes in at this point must make sure that it is in conformance with that approval.

When the land uses changes, whether it's for a restaurant park or a hotel, the Petitioner must prepare a traffic statement showing compliance with the overall traffic cap for that portion of the subdivision occupied by the subject site. Mr. Nelson did this in a letter dated July 14, 2005 (Exhibit 43) which was referenced by Transportation Planning Staff. It is an arithmetic review showing how a hotel use relates to office space use by comparing the number of trips that a hotel would generate in the morning and the afternoon and with that of the equivalent office. In this case, the 104 room hotel would equate to about 34,118 square feet of office space, so that that amount would be deducted from the allowable density that still remains in the I-1 portion of the West Farms site.

In sum, "the finding of adequacy from transportation was made in the original preliminary plan and all we're doing is showing that still applies because that preliminary plan was extended recently to be valid through July 31, 2009 and, therefore, and there is available density and in the deduction for that is the 34,118 square feet." Tr. 93-94.



Even though the number of trips generated by the subject use will exceed 30 in the morning and evening peak hours, a new LATR traffic study was not required by Technical Staff because one was done for the approval of the preliminary plan for the subdivision mentioned earlier, and the finding of that adequacy was made at that time. The Transportation Planning staff found that sufficient since APF approval for the original preliminary plan is still valid, and a traffic study to analyze traffic impact at nearby intersections is not required for this special exception.

In Mr. Nelson's opinion, the special exception will be served by adequate public facilities and services with respect to public roads; the proposed circulation system is safe for both pedestrian and vehicular traffic; the use will have no adverse impact on traffic not inherent to a hotel use in the I-1 zone; it will not create a traffic hazard or traffic nuisance; the traffic and parking which will result from the proposed hotel will be in harmony with the general character of the neighborhood; and the special exception will comply, as to traffic and transportation, with the standards and requirements for the special exception.

[At the end of the hearing, the Hearing Examiner proposed a condition which requires Petitioner to file the Site Plan approved by the Planning Board with the Board of Appeals and to request an administrative modification of the Special Exception Site Plan to coincide with any material changes approved by the Planning Board at Site Plan Review. Petitioner agreed to this condition. Tr. 100-101.]

### **B. People's Counsel**

Martin Klauber, the People's Counsel, did not call any witnesses, but he participated in the hearing and he supports the petition. He also objected to various conditions proposed by Technical Staff on grounds that those conditions were properly the subject of Site Plan and/or Subdivision Review, not Special Exception review. Tr. 9 and 10. [Where appropriate, the Hearing Examiner has modified the conditions proposed by Technical Staff and the Planning Board to insure that Petitioner

keeps the Board of Appeals informed of any changes in the Special Exception Site Plan required by the Site Plan Review of the Planning Board. Some of the objected-to conditions proposed by Technical Staff, as modified by the Hearing Examiner, seem advisable as special exception conditions because they relate to the ongoing operational conditions of the site, and the Hearing Examiner continues to recommend them, as set forth in Part V of this report.]

#### **IV. FINDINGS AND CONCLUSIONS**

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Based on the testimony and evidence of record, the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioner complies with the conditions set forth in Part V, below.

##### **A. Standard for Evaluation**

The standard for evaluation prescribed in Code § 59-G-1.21 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.21. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of

the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a hotel. Characteristics of the proposed hotel use that are consistent with the “necessarily associated” characteristics of hotel uses will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with hotel uses, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed, in the context of the subject property and the general neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff suggests that “[t]he inherent characteristics of a hotel include a building to house guests, rooms to house guests, guests, various lengths of guest stays, services and employees to support guests, deliveries and pickups associated with the operation of the hotel, high on-site activity levels throughout the day for vehicles and people, a sufficient level of outdoor lighting, a noise level associated with a business with much all-day activity.” Exhibit 30, appendix p. i. The Hearing Examiner would expand this list to include the traffic generated by the hotel and the need for parking on site. Technical Staff also notes that “[n]on-inherent characteristics include scale, type of clientele, and types of amenities and services, as well as features unique to the site.” Technical Staff found that “[t]he only non-inherent characteristic of this application is its location on a site that was once contaminated due to the nearby, recently demolished International Fabricare Institute, a dry-cleaning operation, but the site has been remediated and is safe for use, according to the Maryland Department of the Environment. Therefore, staff found no inherent or non-inherent

adverse effects associated with the use sufficient to warrant a recommendation of denial.” The Hearing Examiner agrees. Other than the now-remediated contamination problem, the physical and operational characteristics of the proposed hotel are no different from what is typically encountered with any hotel. Therefore, based on the evidence in this case, and considering size, scale, scope, light, noise, traffic and environment, the Hearing Examiner concludes that there are no non-inherent adverse effects arising from the subject use warranting denial.

### **B. General Conditions**

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff report, the other exhibits and the testimony of the Petitioner’s witnesses provide ample evidence that the general standards would be satisfied in this case.

#### **Sec. 59-G-1.21. General conditions.**

**§5-G-1.21(a)** *-A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

*(1) Is a permissible special exception in the zone.*

Conclusion: A hotel is a permissible special exception in the I-1 Zone, pursuant to Code § 59-C-5.21(a), since it is on a lot “which is a part of or adjacent to an area of at least 50 acres which is zoned industrial or shown for industrial use on an approved and adopted master plan.” The U.S. 29/Cherry Hill Road Employment Area Overlay Zone allows the use because it is permitted in the underlying I-1 zone, and it is not expressly prohibited in the Overlay Zone.

*(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.33 for a hotel as outlined in Part C, below.

- (3) *Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

Conclusion: The property is located within the area covered by the *Fairland Master Plan*, approved and adopted in March 1997. The subject area, consisting of over 400 acres of non-residential uses on property zoned I-1 I-2, I-3, I-4, and C-6 and covered by the overlay zone, was designated in the Master Plan as its major employment area. As stated by the Community-Based Planning, Eastern County Team, in a memo attached to Exhibit 30, "The master plan encouraged uses such as restaurants and banks . . . to support the businesses, employees and area residents. This proposed hotel is located next to a recently approved restaurant row with visibility to US 29." According to Technical Staff, the hotel use and location "are consistent with the intent of the master plan, [and the hotel will be] . . . easily reached via the major road network and is a complementary use with the adjoining restaurants project." Technical Staff also mentioned that the ongoing relocation of the FDA to a site adjacent to the employment area was recognized by the Mater Plan, and that relocation will likely generate "clients /applicants/ and visitors from all over the country who may need places to stay overnight or longer."

Petitioner's land use planner, Victoria Bryant, testified that the Master Plan

“supports a wide array of commercial uses and actually emphasizes a desire for a diverse set of commercial employment and housing in the area. And this would definitely encourage a more diversified [neighborhood] and be supportive of the existing uses in the area.” Tr. 83. Petitioner also observes, in its Statement (Exhibit 3), that the proposed Hilton Garden Inn will provide a hotel for the business traveler, which is a need generated by the “wide variety of employment opportunities” recognized by the Master Plan (p. 12). The Master Plan specifically calls for “the US 29/Cherry Hill Road Employment Area to become diversified and self-supporting by adding compatible uses . . .”. (p. 77). Petitioner argues that the proposed hotel will help to meet this goal of the Master Plan, and the Hearing Examiner agrees.

In sum, the Hearing Examiner finds that the proposed use is consistent with the *Fairland Master Plan*.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

Conclusion: The proposed use will be in harmony with the general character of the neighborhood because its design, scale and bulk will be consistent with the surrounding uses, its architecture and landscaping have been designed to be compatible and, in the words of Petitioner’s landscape architect, it “compliments the surrounding uses,” by providing a hotel for the surrounding businesses and governmental uses and by providing customers for the adjacent restaurant park.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The Hearing Examiner concludes that the proposed use will not be detrimental to the peaceful enjoyment, economic value or development of surrounding properties at the site. On the contrary, having a nearby hotel should enhance the value of surrounding properties by making needed services readily available and by providing a source of customers for nearby restaurants and other businesses under construction.

(6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Based on the nature of the proposed use (*i.e.*, a hotel), the special exception would cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site. There will be some traffic generated by the hotel, but its volume has already been accounted for and approved in the subdivision process, and the design of the circulation system is safe and efficient. Petitioner observes (Exhibit 3, p.10) that the use is considerably less intensive than other matter-of-right uses permitted in the I-1 Zone. In terms of lighting, the proposed parking lot lighting will be “down-lit” with shoe box type cut-off fixtures, thereby ensuring it will not create any adverse impacts or excessive spillover to adjacent properties.

(7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: The proposed use is in a industrial, not residential area, which is consistent with the Master Plan recommendations. The only active special exception in the area reported

by Technical Staff is S-1258/59, for the Courtyard Marriott Hotel located at Broadbirch Drive and Whitehorn Court. The planned hotel will have no adverse effect on any neighboring one-family residential area, the closest of which is about half a mile away.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site. Any health concerns raised by the dangerous chemicals utilized by the International Fabricare Institute, a previous occupant of the area, have been fully addressed by Technical Staff, as discussed on pages 21-22 of this report. Technical Staff concluded that neither ground water nor vapors would constitute a health hazard to those on the site. The Hearing Examiner has recommended a condition proposed by Technical Staff prohibiting Petitioner from disturbing or interrupting the groundwater monitoring wells at the site, and requiring Petitioner to allow access for monitoring.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: Petitioner correctly notes in its Statement (Exhibit 3, p.11) that the adequate public facilities analysis was conducted as part of review of the Preliminary Plan of subdivision for the area including the subject site. The determination of adequate public facilities for the then West-Farm business park, of which the proposed Hilton Garden Inn on the subject site is a component part, satisfies the requirements of this



section. The Property is served by public water and sewer and there are adequate police and fire protection capabilities in the area. Technical Staff also found, and the Hearing Examiner agrees, that the subject property is adequately served by the specified public services and facilities. If additional handicap access is required at Site Plan, Petitioner will be required by condition to so inform the Board of Appeals and to file a revised special exception site plan.

- (i) *If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception. If the special exception does not require approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Board of Appeals when the special exception is considered. The adequacy of public facilities review must include the Local Area Transportation Review and the Policy Area Transportation Review,<sup>11</sup> as required in the applicable Annual Growth Policy.*

Conclusion: The special exception sought in this case would not require additional approval of a preliminary plan of subdivision. Therefore, the Board must consider Local Area Transportation Review (LATR). Transportation Planning staff analyzed the traffic which would be generated by the hotel's activities and determined that the application satisfies LATR requirements without the need for a traffic study. See Memo attached to Exhibit 30, discussed on pp. 18-19 of this report. This conclusion is based on the fact that the overall area of which the subject site is a part was approved for subdivision already under Preliminary Plan No. 1-91038, and the approval of its Adequate Public Facilities test remains valid through July 31, 2009. Transportation Planning Staff also received a sight distance evaluation form signed and sealed by Petitioner's engineer indicating that sight

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<sup>11</sup> Policy Area Transportation Review (PATR) is no longer considered in the APF review under the FY 2005 AGP.

distances are adequate (Exhibit 22). Petitioner has also provided the 73 parking spaces (including four handicapped accessible spaces) required by Zoning Ordinance §59-E-3.7.

In addition, there are five bicycle and two motor cycle spaces provided.

- (ii) *With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.*

Conclusion: Transportation Planning Staff found that the special exception “will not adversely affect area pedestrian or bicyclist accessibility or safety.” Technical Staff also concluded that “[t]he use is served by adequate public facilities and will not reduce the safety of vehicular or pedestrian traffic.” Exhibit 30, Appendix p. iii. The same conclusion was reached by David Nelson, Petitioner’s traffic engineer. Tr. 95. The Hearing Examiner so finds.

### **C. Specific Standards**

The testimony and the exhibits of record [including the Technical Staff Report (Ex. 30)] provide sufficient evidence that the specific standards required by Section 59-G-2.33 are satisfied in this case, as described below.

#### **Sec. 59-G-2.33. Hotels and motels.**

*A hotel, motel or inn may be allowed; provided, that all the requirements imposed in the zone are met; and provided further, that special conditions, such as for additional fencing and/or planting or other landscaping, additional setback from property lines, location and arrangement of lighting and other reasonable requirements deemed necessary to safeguard the general community interest and welfare may be invoked by the board as requisites to the grant of special exception. An apartment hotel lawfully existing prior to April 26, 1966, may be allowed to increase the number of its guest rooms to more than 20 percent, but not above 45 percent of its total dwelling units in accordance with the requirements of this chapter, including those standards of this section which may reasonably be applied to an existing facility. Such an apartment-hotel is not required to maintain any guest rooms.*

Conclusion: Technical Staff states (Exhibit 30, appendix p. iv) that “All applicable requirements of the I-1 zone and the Cherry Hill Overlay Zone are met,” as set forth in the Revised Special Exception Site Plan table reproduced on page 11 of this report (and in Exhibit 30, Appendix pp. v.-v.i.). Technical Staff also notes that landscaping and screening are sufficient. The proposal was brought to the Development Review Committee for comments, and as a result of the DRC’s input, Petitioner revised its plans. Technical Staff found the revised plan to be suitable and compatible, and that revised plan will undergo site plan review by the Planning Board after the review by the Board of Appeals. The Hearing Examiner finds that Petitioner has met the requirements imposed by the zone, and has recommended conditions in Part V of this report to safeguard “*the general community interest.*”

#### **D. Additional Applicable Standards (Including Needs Analysis)**

##### **Section 59-G-1.23. General development standards.**

(a) *Development Standards. Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.*

Conclusion: As stated above, the proposed special exception will be in compliance with all development standards for the applicable zones, as shown in the table on page 11 of this report. It was derived from the Technical Staff Report (Exhibit 30, Appendix pp. v.-v.i.) and the revised Site Plan (Exhibit 49(a)):

(b) *Parking requirements. Special exceptions are subject to all relevant requirements of Article 59-E.*

Conclusion: Technical Staff concluded, and the Hearing Examiner agrees, that the 73 parking spaces (including four handicapped accessible spaces) provided would satisfy the requirements for the proposed hotel. See discussion on page 19 of this report.

(c) Minimum frontage [waivers] \* \* \*

Conclusion: Not applicable.

(d) *Forest conservation. If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.*

Conclusion: Not applicable. The property is exempt from the forest conservation requirements of Chapter 22A. See discussion on page 20 of this report.

(e) *Water quality plan. If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.*

Conclusion: The Montgomery County Department of Permitting Services (DPS) has approved a Stormwater Management Concept Plan for the site (Exhibit 10). An existing regional stormwater management facility, previously approved as part of a stormwater management plan for WestFarm Technology Park, will accommodate stormwater management for the subject property. Water quality treatment will occur on site in a sand filter system that will receive stormwater runoff from paved portions of the facility and convey them to another filter in the northeast portion of the facility. Storm drains from the roofs will convey roof runoff directly to dry

wells. Based on the approval of Environmental Planning Staff, the Hearing Examiner finds that Petitioner is in compliance with this section.

(f) *Signs. The display of a sign must comply with Article 59-F.*

Conclusion: Petitioners have not indicated what signage is contemplated for their property. The Hearing Examiner will recommend a condition that no signs be posted unless a permit is granted by DPS, and the Board of Appeals receives a copy thereof. A modified special exception site plan should be submitted at that time showing the locations and dimensions of any signs.

(g) *Building compatibility in residential zones. Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.*

Conclusion: Not applicable.

(h) *Lighting in residential zones. All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:*

(1) *Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*

(2) *Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.*

Conclusion: Not applicable, because there are no adjacent residential zones.

#### **59-G-1.24. Neighborhood need.**

*In addition to the findings and requirements of Article 59-G, the following special exceptions may only be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that a need exists for the proposed use to serve the population in the general neighborhood, considering the present availability of identical or similar uses to that neighborhood:*

- (1) *Automobile filling station.*
- (2) *Automobile and light trailer rental lot, outdoor.*
- (3) *Automobile, truck and trailer rental lot, outdoor.*
- (4) *Automobile sales and service center.*
- (5) *Swimming pool, community.*
- (6) *Swimming pool, commercial.*

Conclusion: Not applicable to a hotel use.

#### **Section 59-G-1.26. Exterior appearance in residential zones.**

*A structure to be constructed, reconstructed or altered pursuant to a special exception in a residential zone must, whenever practicable, have the exterior appearance of a residential building of the type otherwise permitted and must have suitable landscaping, streetscaping, pedestrian circulation and screening consisting of planting or fencing whenever deemed necessary and to the extent required by the Board, the Hearing Examiner or the District Council. Noise mitigation measures must be provided as necessary.*

Conclusion: Not applicable.

#### **59-G-1.25. County need**

*In addition to the findings of Article 59-G, the following special exceptions may only be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that a need exists for the proposed use due to an insufficient number of similar uses presently serving existing population concentrations in the County, and the uses at the location proposed will not result in a multiplicity or saturation of similar uses in the same general neighborhood:*

- (1) *Eating and drinking establishments—Drive-in restaurant.*
- (2) *Funeral parlors and undertaking establishment.*
- (3) *Hotel, motel or inn.*
- (4) *Rifle, pistol and skeet shooting range, outdoor.*
- (5) *Sanitary fill, incinerator, or private solid waste transfer station.*
- (6) *Public use heliport/helistop.*
- (7) *Conference center with lodging.*

Conclusion: Because the proposed use is a hotel, Petitioner is required to demonstrate that “*a need exists for the proposed use [in the County].*” Technical Staff (Exhibit 30, p.9) notes that Petitioner performed a needs analysis (Exhibit 17(a)), and revised it twice at the

behest of Technical Staff. The final Supplemental Needs Analysis, dated January 12, 2006 (Exhibit 25) satisfied Technical Staff that there is a need for the proposed hotel at 2200 Broadbirch Drive, as discussed in Research Staff's memo dated January 12, 2006 (attached to Exhibit 30)."

The needs analysis was performed by a consultant, who determined that there was a need for the proposed hotel (Exhibit 17(a), p. 49). The study projected that occupancy of the new hotel after three years, which is considered the stabilized period, would be approximately 80 percent. The market area under consideration for the proposed hotel is shown in Exhibit 25(a) to include hotels within a three mile radius of the subject site. As testified to by Baywood's president, Al Patel, there are only three primary competitors for the proposed hotel within that three mile business market area, and there are numerous demand generators that actively require room nights in the area. The occupancy rates of the three primary competitors in the area range from approximately 75 to 78 percent right now. Baywood also anticipates an increased demand from some new businesses in the area in the next two to three years, including the East County Center for Science and Technology and also the FDA expansion, which will result in approximately 7,000 to 8,000 new employees being relocated into the immediate market area. Tr. 18.

According to Mr. Patel, the rule of thumb is that when there is 65 percent occupancy and above in the market area, developers will start actively seeking hotel development opportunities. This area is doing approximately 75-78 percent occupancy currently, and increased demand is projected in the near future. When you have 75-78 percent occupancy overall, it means that at certain periods, the available hotels will be completely full. For example, from Monday through Thursday, there

were no rooms available for approximately 26 weeks of the year, and the existing hotels were displacing about 12,000 guests from the area. Tr. 18-21.

In light of the un rebutted evidence and Technical Staff's agreement, the Hearing Examiner finds that the need exists for the proposed use due to an insufficient number of similar uses presently serving the existing population concentrations in the County.<sup>12</sup>

Based on the testimony and evidence of record, I conclude that the hotel use proposed by Petitioner, as conditioned below, meets the specific and general requirements for the special exception, and that the Petition should be granted, subject to the conditions set forth in Part V of this report.

## **V. RECOMMENDATION**

Based on the foregoing analysis, I recommend that Petition No. S-2656, seeking a special exception to establish a hotel (a Hilton Garden Inn) at 2200 Broadburch Drive, Silver Spring, Maryland, be GRANTED, with the following conditions:<sup>13</sup>

1. Petitioner shall be bound by all of its testimony and exhibits of record, and by the testimony of its witnesses and representations of counsel identified in this report.
2. Petitioner must comply with any conditions set by the Department of Permitting Services in approving the site's Stormwater Management Plan.
3. There must be no encroachment into the wetland buffer areas except for necessary stormwater management outfalls, as approved by DPS.

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<sup>12</sup> The Hearing Examiner notes that the market itself is the best determiner of County need for another hotel. It would not make sense for a business to invest large sums of capital to build a new hotel in a location where it was not likely to have adequate business. Nevertheless, Petitioner has produced the proof required by our statute.

<sup>13</sup> Martin Klauber, the People's Counsel, objected to Technical Staff's formulations of proposed conditions 2, 3, 4, 6 and 7 on grounds that those conditions are properly the subject of Site Plan and/or Subdivision Review, not Special Exception review. Tr. 9 and 10. Where appropriate, the Hearing Examiner has modified the conditions proposed by Technical Staff and the Planning Board to insure that Petitioner keeps the Board of Appeals informed of any changes in the Special Exception Site Plan required by the Site Plan Review of the Planning Board. Some of the objected-to conditions proposed by Technical Staff, as modified by the Hearing Examiner, seem advisable as special exception conditions because they relate to the ongoing operational conditions of the site, and the Hearing Examiner continues to recommend them. See e.g., 2, 3 and 4, above.



4. Petitioner must not disturb or in any way interrupt the groundwater monitoring wells at the site and must allow access for monitoring.
5. Petitioner's hotel shall not exceed 104 rooms, which is equivalent to 34,118 square feet of general office use, and a staff of 25.
6. Petitioner shall install a bus shelter on Broadbirch Drive in the vicinity of the hotel. The precise location and details of the bus shelter should be determined at the time of site plan review, and any necessary amendment to the special exception site plan shall be forwarded to the Board of Appeals as an administrative modification request.
7. If, at the time of site plan review, the Petitioner is required to provide for additional sidewalks, handicapped ramps and crosswalks, any necessary amendment to the special exception site plan shall be forwarded to the Board of Appeals as an administrative modification request.
8. No more than five scheduled deliveries of goods may be made to the hotel per week.
9. Petitioner must obtain sign permits from the Department of Permitting Services and file them with the Board before erecting any signs. A modified special exception site plan should be submitted at that time showing the locations and dimensions of any signs.
10. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein.  
  
Petitioner shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.
11. If the Site Plan approved by the Planning Board at Site Plan Review differs materially

from the Special Exception Site Plan (Exhibit 49(a) approved by the Board of Appeals, Petitioner must file the Site Plan with the Board of Appeals and request an administrative modification of the Special Exception Site Plan to coincide with the Site Plan approved by the Planning Board.

Dated: March 21, 2006

Respectfully submitted,

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Martin L. Grossman  
Hearing Examiner